



“university or other institution of higher education”, and so small entity status was and continues to be appropriate pursuant to 37 C.F.R. § 1.27(a)(3).

Regardless, the Deficiency Payment was ostensibly not accepted by the Patent Office as evidenced by a communication mailed February 16, 2011 identified as “a notice regarding [the] request for acceptance of a fee deficiency submission under 37 CFR 1.28” (the Notice). Notwithstanding the non-acceptance of the Deficiency Payment as stated in the Notice, Deposit Account No. 192553 was in fact charged the amount of \$2,055.00 on January 12, 2011. Further, the Notice stated that despite not accepting the Deficiency Payment, small entity status for the ‘470 Patent had been lost. However, PAIR is still reporting that the ‘470 Patent is entitled to small entity status.

Tredelle Jackson, Paralegal Specialist at the Office of Petitions was contacted at approximately 3:30pm on May 12, 2011 to clarify the seemingly conflicting statements in the Notice and as reported on PAIR. Ms. Jackson confirmed that the Deficiency Payment was not accepted, namely because it was determined not to comply with 37 C.F.R. § 1.33(b), as also stated in the Notice. Ms. Jackson also confirmed that the paragraph in the Notice regarding the loss of small entity status was accidentally not removed from a template letter used by the Office of Petitions, and that the ‘470 patent has always and continues presently to enjoy small entity status.

Although Ms. Jackson did not confirm by specific reference to 37 C.F.R., it is submitted that the Patent Office appears to have accepted payment despite a noncompliant deficiency payment submission, pursuant to 37 C.F.R. § 1.28(c)(3). It is also submitted that the ‘470 Patent never lost small entity status due to the determination by the Patent Office that the Deficiency Payment was not compliant with 37 C.F.R. § 1.33(b), and therefore that the provisions of 37 C.F.R. § 1.28(d) are not applicable to the instant facts. Instead, § 1.28(d) would have been appropriate only if the Deficiency Payment was found to be in compliance with 37 C.F.R. § 1.33(b).

Since the Deficiency Payment was both not accepted and indeed not necessary considering that small entity status has never been lost in the subject patent, the charge of \$2,055.00 to Deposit Account No. 192553 on January 12, 2011 was in excess of what was required. MIT is therefore entitled to a refund under 37 C.F.R. § 1.26(a).

It is also to be noted that the three month time period to request a refund under 37 C.F.R. § 1.28(a) is inapplicable to the current facts and that the standard length of two years from payment of the fee should control. 37 C.F.R. § 1.28(a) is only applicable where there is "later establishment of small entity status." Small entity status was previously established and has always been appropriate.

Accordingly, a refund in the amount of \$2,055.00 is due and it is requested that this amount be credited to Deposit Account No. 192553.

Respectfully Submitted,

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